No. 85-5238

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MAJOR CRANE, - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

DAVID L. ARMSTRONG
Attorney General

JOHN S. GILLIG
Assistant Attorney General

VIRGIL W. WEBB III
Assistant Attorney General
116 Capitol Building
Frankfort, Kentucky 40601-3494
Telephone: (502) 564-7600
Counsel for Respondent

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WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

In a criminal case, does a state trial court deny a defendant's Sixth and Fourteenth Amendment rights when, after the trial court determines that the confession was voluntarily made, and therefore constitutes admissible evidence, it excludes from the jury's consideration evidence relating to voluntariness which has little or no relationship to any other issue?

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OPINIONS BELOW

Petitioner has correctly set forth the pertinent opinions below.

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Sixth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE CASE

A. Procedural History

The procedural history is correctly set out in petitioner's brief.

B. Facts of the Crime

At approximately 10:40 p.m. on August 7, 1981, Randall Todd, a clerk at Keg Liquors in Louisville, Kentucky, was found dead. Apparently no money was taken from the store (Transcript of Evidence, "TE," Volume II, 33). A half-pint bottle of W. T. Samuels whiskey was on the counter (TE II 11). A brown paper sack was also discovered at the scene (TE IV 79).

C. The Suppression Hearing

A week after the murder, police received a tip that implicated Major Crane in a gas station burglary (Transcript of Suppression Hearing "TH" 6-7; Joint Appendix, "JA," 2-3). Crane was arrested and taken to a police sub-station. He was immediately informed of his Miranda rights. Petitioner replied: " . . . [Y]eah, I know, I have been through this before" (JA 3). Crane's aunt was contacted at once and told police that she and petitioner's mother would come to the detention center within an hour (JA 4).

While police were typing an arrest slip petitioner spontaneously said, "I confess." The officer ignored Crane until he began to detail cases which the officer knew were unsolved (*Id.*).

Because of petitioner's admissions, the officer decided to take him to the Youth Bureau at City Headquarters to allow county officers to question Crane. On the way, petitioner was asked if he knew about the Keg Liquors robbery. Petitioner denied any knowledge and the matter was dropped (JA 5).

Petitioner was processed at the Youth Bureau until 6:59 p.m. He was then taken to the detention center, arriving at 7:08 p.m. Police again called Crane's home but got no answer.[1] Only then was Crane taken to an interrogation room and questioned about the liquor store (JA 6).

Petitioner initially stated that he fired a shot during the robbery of a specific hardware store. When police pointed out that no one was shot in that robbery, Crane explained:

> No, I am talking about Keg Liquors. . . . That is where I am talking about is at Keg Liquors where that guy got killed.
>
> (JA 7)

Police then took a tape recorded statement (*Id.*). The statement began at 7:50 p.m. and concluded at 8:40 p.m. (JA 11).

At the hearing petitioner was permitted to fully cross-examine the arresting officers about the length of the detention and when and where questioning occurred (JA 8-9). Crane elicited testimony that two officers were in the room with him at all times. One other

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[1] In fact police made ten attempts to contact Crane's family during the evening (JA 7).

officer was present during most of the time. Two others were in and out of the room during the questioning. Never were all five in the room at the same time (JA 9). Petitioner also demonstrated that he spoke to no one but police officers until after the confession. One officer said Crane did not ask to use the telephone (JA 11).

In his own behalf, petitioner called his social worker, Charles Burton, as a witness. Burton said Crane had a third or fourth grade academic achievement level in 1981 (TH 37). Burton acknowledged that Crane was already familiar with the juvenile justice system and had a criminal record in juvenile court at the time of the crime. He also said Crane had been evaluated as a sophisticated delinquent (TH 39-40).[2]

Crane testified police asked him repeatedly about a number of crimes (JA 17). He said they threatened to knock his head off if he did not sign a waiver of rights (JA 19). He said he was kept in a windowless room with "about six" policemen during the questioning and that he said he repeatedly asked to call his mother but was refused permission (JA 18-19). Crane testified that some of his confession consisted of things police told him to say and some was simply made up (TH 58, 61, 68).

Crane admitted he knew that he had the right to remain silent and that police are not permitted to strike a suspect (TH 54). He also knew that a coerced statement is inadmissible (TH 64). On cross-examination Crane could not specify any additional threats (TH

[2]Crane did not present any testimony about his intelligence on avowal or in his Kentucky Supreme Court brief.

53). He admitted police did not strike him but insisted that one officer pushed Crane's head (TH 54). Crane's motion to suppress was denied. The trial court found that the statement was admissible and said:

> The Court again points to the fact that it is not involved at this juncture in making a determination as to the truth of the statements, the contents of the statements, oral or recorded, which were given but as to the admissibility which would go towards a protection of the defendant's rights prior to giving statements and the Court has found that his rights were protected. (TH 74)

The court specifically stated that (1) there was no sweating or coercion; (2) there was no overreaching by officers of the Louisville Police Department; (3) there was no delay in taking the petitioner to the Youth Detention Center; (4) in comparing the conflicting testimony between petitioner and the police officers the credibility "lies entirely with the police"; and (5) petitioner has had numerous dealings with the law, is "street wise" and understood his rights (JA 21-22).

D. The Trial

Petitioner in his opening statement claimed that the circumstances surrounding the confession, specifically, the length of the questioning and the fact that petitioner was alone with five officers, showed that the statement was not credible (JA 23-24). Counsel also detailed at length the inconsistences in the statement (JA 24-26).

After the defense opening statement was concluded the prosecution brought a motion *in limine* to prevent the defense from re-examining the issue of voluntariness (JA 27). The court ruled that the defense could not attack the voluntariness of the statement but could bring up any inconsistencies in the statement. The court specifically ruled that the defense could not introduce evidence about the length of the detention or that Crane was alone with the police (JA 28).[3]

The court permitted an avowal as to any matters the defense believed were improperly excluded (JA 29).

At trial the evidence on behalf of the prosecution which incriminated petitioner consisted of two statements Crane made to friends and family, the statement of a co-defendant and Crane's own confession.

Petitioner's mother told police that Crane said he robbed the store and shot the victim (TE IV 62). Crane also told a friend he robbed a liquor store (TE II 57).

The confession of petitioner's co-defendant was also in evidence. His detailed confession accused Crane of the robbery and murder. This statement resolved any inconsistencies regarding the caliber of the weapon and why no money was taken (TE II 28-34; TE IV 8-9).

Crane has not challenged the admissibility of his confession, which contained facts only the killer could know. Crane knew there was a half pint of whiskey

[3]In fact, the jury did hear evidence about the length of the detention (JA 31-32). They also learned that Crane was alone with four officers during the questioning (TE II 45).

on the counter at the time of the killing (JA 36-37; TE IV 47). Crane took a brown paper bag to the store for loot (TE II 21). Such a bag was found at the scene (TE IV 53, 78-79).

As petitioner acknowledges, he was permitted to question the police about his confession. He cross-examined the arresting officer extensively on the numerous factual mistakes in the confession, such as those relating to the time of the crime, whether any money was taken, and whether the store had an alarm system (JA 41-43). He also questioned police about a correction made by Crane as to the actual caliber of the murder weapon (TE II 47-48). Petitioner elicited from the firearms examiner the fact that the caliber mentioned in the taped statement was incorrect (TE II 66).

On avowal petitioner introduced evidence concerning the length of the detention. He also elicited that the room was either ten or twelve feet square and had no windows. Even that testimony was weakened because the only officer who was asked refused to rule out the possibility that the door was left open. He also showed that four or five policemen were present during the questioning (JA 45-~~).

In response the Commonwealth showed that Crane was calm and was permitted to use the restroom. Officers also asked him if he wanted food or drink (JA 48-49). One officer apparently made more than one trip to get Crane various snacks (JA 50).

E. The Appeal

On appeal the Kentucky Supreme Court affirmed. *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985). The court held that the evidence Crane sought to introduce related solely to voluntariness. The court stated that under the orthodox rule followed in the Commonwealth, voluntariness is conclusively determined by the trial court. Kentucky Rule of Criminal Procedure (RCr) 9.78. The court stated that a defendant may introduce any competent evidence relative to the authenticity, reliability or credibility of a confession.

SUMMARY OF THE ARGUMENT

The States follow one of two procedures for determining the voluntariness of a confession. The Wigmore orthodox rule, followed by the majority of states, including Kentucky, holds that the pre-trial determination of the judge on the issue of voluntariness is conclusive and binding upon the jury. At trial the jury is normally instructed that it shall weigh all the evidence, but is not given the option of rejecting the confession as involuntary. Under the Massachusetts rule the trial court makes an initial voluntariness determination; if voluntary the confession is admitted into evidence but the jury is presented the circumstances surrounding its procurement and is instructed that they may reject the confession as evidence entirely if they find it was given involuntarily. The Court has given at least tacit approval to both procedures in *Jackson* v. *Denno,* 378 U. S. 368 (1964) and *Lego* v. *Twomey,* 404 U. S. 477 (1972), and other cases.

As originally applied throughout the states, and as expounded by Wigmore, the purpose of excluding a coerced confession was related to that confession's presumed unreliability; coerced confessions were, Wigmore said, testimonially untrustworthy. Due to the narrow focus of the admissibility inquiry, the trial court was encouraged, indeed, required, to utilize indicia of reliability in making the threshold determination of admissibility. This determination was purely an evidentiary question. The trial court could believe a confession beaten out of a suspect was true and admit it into evidence. The jury would then re-examine all evidence — the circumstances of the confession (the beating) versus the credibility of the statement — and assign it the weight they believed it deserved. The trial court's determination was truly "threshold" because the court determined admissibility by gauging reliability — then the jury was given the facts and told to do the same thing.

This explains repeated references in the case law to the practice of presenting to the jury the circumstances of the confession under the orthodox rule. However, as the Kentucky Supreme Court has recognized, the voluntariness inquiry is no longer concerned with reliability. In fact, this Court has specifically forbidden the trial court to consider indicia of reliability in making its pre-trial voluntariness determination. That determination is now concerned with police misconduct and otherwise insuring that the confession represents the "free and voluntary" choice of the confessor. The

functions of judge and jury no longer overlap under the orthodox rule because the judge determines voluntariness (excluding credibility) while the jury determines credibility (excluding voluntariness).

This Court's movement of the law away from allowing coerced but reliable confessions into evidence is the foundation for the Kentucky Supreme Court's rule in *Crane*. The rule provides that the trial court can exclude from the jury's consideration evidence relating solely to voluntariness (having little or no relation to any other issue) while permitting the introduction of any competent evidence relating to authenticity, reliability, or credibility. It is based upon the validity of the constitutional safeguards provided by the Court and the States in developing strict standards of voluntariness, requiring a pre-trial suppression hearing to fully resolve the issue, and providing for appellate and habeas corpus review.

Petitioner has provided no constitutional basis for a holding by the Court that all circumstances of all confessions are inherently related to credibility and therefore must be admitted before a jury which has no power to reject the confession as evidence on the basis of voluntariness. Although petitioner attacks the fact that the voluntariness of the confession is not re-submitted to the jury (as under the Massachusetts rule), that issue was not raised below.

There are also strong policy considerations for the Kentucky Supreme Court's rule in *Crane*. It reinforces the importance of the judge's independent determination of voluntariness at the pre-trial suppression hearing. It places subtle distinctions between voluntariness and credibility in the hands of the judge, not the jury. It prevents the interjection of conclusively settled preliminary issues into the trial in chief. Finally, it keeps the jury from hearing only one side of the voluntariness issue, since the defendant's prior experience with the law and with police interrogation will be excluded unless the defendant takes the stand. The rule in *Crane* is a logical extension of the orthodox rule based firmly upon the Court's expansion of the voluntariness inquiry. Because the functions of judge and jury no longer overlap, the Kentucky Supreme Court may limit the evidence each may hear to that relevant to the distinct function of each.

Finally, even if the Kentucky trial court erred by limiting the admission of evidence, reversal is not required. Almost all of the facts elicited on avowal were presented to the jury. If error occurred, the case should be remanded to the Kentucky Supreme Court for a determination of prejudice.

ARGUMENT

In his brief, petitioner divides his single argument into four sub-arguments numbered I through IV. Respondent has designated sub-headings by letter and has combined petitioner's sub-arguments I and II in respondent's Argument I.A. and petitioner's sub-arguments III and IV in respondent's Argument I.B.

I.

IN A CRIMINAL CASE, A STATE TRIAL COURT DOES NOT DENY A DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN, AFTER THE TRIAL COURT DETERMINES THAT THE CONFESSION WAS VOLUNTARILY MADE, AND THEREFORE CONSTITUTES ADMISSIBLE EVIDENCE, IT EXCLUDES FROM THE JURY'S CONSIDERATION EVIDENCE RELATING TO VOLUNTARINESS WHICH HAS LITTLE OR NO RELATIONSHIP TO ANY OTHER ISSUE.

A. In Light of Recent Developments in the Law the Trial Court's Refusal to Allow Petitioner to Introduce Irrelevant Evidence by Cross-Examination Did Not Deny Petitioner Due Process of Law and His Right to Confront Witnesses.

The petitioner asks the Court to hold that a criminal defendant has a constitutional right to present to the jury all the circumstances surrounding the taking of the confession after the trial judge has conclusively determined, as a matter of constitutional law, that the confession was given voluntarily. This claim is supported neither by logic nor by case law. It proposes a *per se* constitutional rule which is unnecessary and burdensome. Recent developments in the law of confessions provide a constitutional foundation for the rule of the Kentucky Supreme Court in *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985); (JA 68-78), that evidence irrelevant to the issue of credibility need not be given to the jury. The rule in *Crane* is a logical extension of Wigmore's orthodox rule, in use in over half the States, and is a constitutional exercise of a

state's power to delineate between the functions of judge and jury.[4]

Early state and federal court decisions stressed, as did Wigmore, that the question of the *admissibility* of a confession was for the judge and its weight was for the jury. Implicit within this concept was that when the jury considered the confessions they "must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the court declared, as matter of law, they were voluntary."[5] However, the original formulation of the orthodox principle also embodied this result:

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[4]The states have broad powers to establish rules relating to confessions. This Court stated in *Stein* v. *New York,* 346 U. S. 156, 179 (1953):

> The states are free to allocate functions between judge and jury as they see fit.

That statement was reiterated in *Jackson* v. *Denno,* 378 U. S. 368, 391, n. 19 (1964), wherein this Court stated:

> Whether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with Stein that the States are free to allocate functions between judge and jury as they see fit.

See Fletcher v. *Weir,* 455 U. S. 603 (1982).

Consider also the requirement that a confession be corroborated before being admitted into evidence. A finding of corroboration is a question of law because it determines admissibility; in some jurisdictions the question is resubmitted to the jury, while in others it is not. Comment: "Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions," 1984 *Wis. L. Rev.* 1121, 1140 (1984).

[5]*Burton* v. *State,* 107 Ala. 108, 130-131, 18 So. 284, 290-291 (1895), still cited in Wigmore as illustrative of the orthodox rule. 3 Wigmore, *Evidence* § 861 (Chadbourn rev. 1970), at 571.

> It follows that, although the jury may come to the conclusion that the confessions were not voluntary, yet if, from extrinsic evidence, or from their character and circumstances, the jury are satisfied that they are true, the jury should act upon them . . . .[6]

The Chadbourn revision of Wigmore continues to utilize this 1895 case as a fair presentation of the "orthodox principle." Nonetheless, it is elsewhere recognized that the foundation of Wigmore's original orthodox rule has been quietly swept away by this Court's more recent rulings that involuntary confessions are primarily excluded not because they are unreliable, but because exclusion protects a defendant's right to a fair trial and deters police misconduct.

Under common law it was well-established that coerced confessions were excluded because the circumstances of their coercion made them *"testimonially untrustworthy."* Wigmore, *Evidence* §822 (3rd Ed. 1940).[7] In §823 of the same edition Wigmore concluded that:

> (a) A confession is not excluded because of any *breach of confidence* or of good faith. . . . (b) A confession is not excluded because of any *illegality* in the method of obtaining it. . . . (c) . . . [A] confession is not rejected because of any connection with the *privilege against self-crimination.*
>
> *Id.*, at 249; Emphasis in original.[8]

[6] *Id.*

[7] Chadbourn states this thesis was supported by copious documentation. Part of the now exercised test appears in 3 Wigmore, *Evidence* § 822, n. 1, at 329 (Chadbourn rev. 1970); (Emphasis in original).

[8] Reproduced by Chadbourn, *Id.*, at 330.

For this reason the early version of the orthodox rule laid a much broader foundation for admitting a confession into evidence than would be possible today. The scope of inquiry was by definition based upon the *reliability* or trustworthiness of the confession. Review was focused upon whether police actions were of sufficient force or effect so as to produce a false confession.[9] Inherent in this review was the now constitutionally impermissible practice of allowing the trial court to consider the probable reliability of the confession as a strong factor in determining its voluntariness. See *Rogers* v. *Richmond*, 365 U. S. 534, 542-544 (1961). Under this division of function between judge and jury it is clear that the admissibility of the confession was a threshold issue in the sense that the judge would necessarily use the same evidence as the jury — the

[9] *Id.*, at 335. The Court has noted that this same false premise led to the wrong conclusion in *Stein* v. *New York*, 346 U. S. 156 (1953):

> The failure to inquire into the reliability of the jury's resolution of disputed factual considerations underlying its conclusion as to voluntariness — findings which were afforded decisive weight by the Court in *Stein* — was not a mere oversight but stemmed from the premise underlying the *Stein* opinion that the exclusion of involuntary confessions is constitutionally required solely because of the inherent untrustworthiness of a coerced confession. It followed from this premise that a reliable or true confession need not be rejected as involuntary and that evidence corroborating the truth or falsity of the confession and the guilt or innocence of the accused is indeed pertinent to the determination of the coercion issue.

Jackson v. *Denno*, 378 U. S. at 383-384. See also Meltzer, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 21 *U. Chi. L. Rev.* 317 (1954).

probable reliability of the confession — in reaching the evidentiary conclusion. The jury would naturally receive the same evidence of the circumstances surrounding the confession because this would also be weighed in the finding of guilt. The jury would then get a second chance at the confession because although the *admissibility* of the confession was not a jury issue, the circumstances would be presented to the jury so that the trier of fact could weigh the impact of threats or beatings as tending to produce an untrustworthy statement versus other evidence tending to show that its contents were true.

The foregoing demonstrates that the original limitations of the exclusionary rule regarding confessions presented an entirely different division of labor between judge and jury. Because the judge was concerned with admissibility as a factor of *reliability* — an obvious concern of the trier of fact — there was a natural and unpreventable overlap which justified repeating for the jury the evidence presented as part of the motion to suppress. That justification no longer exists.

In a series of cases the Court gradually expanded the view that the legal question of the admissibility of a confession did not depend upon mere reliability.[10]

[10]See *Lisenba* v. *California*, 314 U. S. 219, 236 (1941) (Purpose of due process "is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."); *Haley* v. *Ohio*, 332 U. S. 596, (1948); *Watts* v. *Indiana*, 338 U. S. 49 (1949); *Brown* v. *Allen*, 344 U. S. 443, 475 (1953) ("When the facts admitted by the state show

(Footnote Continued on Next Page)

This process has been developed to the point where it is obvious that to say that a confession is "involuntary" (and therefore inadmissible as evidence) is to invoke a complex legal standard.[11] This standard now has focused on the Due Process Clause and upon two underlying values (rather than merely reliability) which govern the propriety of the admissibility of this evidence. These underlying values are:

First, confessions obtained by offensive police practices will be excluded even though the reliability of the confession itself is unquestioned. *Rogers* v. *Richmond*, 365 U. S. 534 (1961). Reliable confessions will be excluded even where there is ample evidence apart from the confession to support the conviction. *Malinski* v. *New York*, 324 U. S. 401 (1945); *Stroble* v. *California*, 343 U. S. 181 (1952); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Jackson* v. *Denno*, 378 U. S. at 386.

Secondly, confessions obtained under circumstances in which a defendant's free choice is impaired are inadmissible, even if the police do not resort to offensive practices. *Townsend* v. *Sain*, 372 U. S. 293 (1963). The application of the rule of Due Process voluntariness requires an examination of the "totality of circumstances," *Haynes* v. *Washington*, 373 U. S. 503 (1963) where the overpowering of a defendant's free

(Footnote Continued From Preceding Page)

coercion . . ., a conviction will be set aside as violative of due process. . . . This is true even though the evidence apart from the confessions might have been sufficient to sustain the jury's verdict.").

[11]See Grano, "Voluntariness, Free Will, and the Law of Confessions," 65 *Virginia Law Review* 859 (1979).

and voluntary choice is alleged. *Miller* v. *Fenton,* No. 84-5786 (December 3, 1985), slip op., at 13.

The rule of the Kentucky Supreme Court in *Crane* does not represent a startling departure from the orthodox rule; it is, rather, a logical extension of it. The orthodox rule need not, and in some jurisdictions does not, permit the exclusion of evidence relevant only to voluntariness. Nevertheless, to permit this exclusion under limited circumstances and subject it to the protection of state and federal review, as the Kentucky Supreme Court does, is the better practice. This may be amply demonstrated by considering just exactly what it is that petitioner wanted to accomplish in the instant case.

Under the application of the orthodox rule urged by petitioner, once the trial judge admitted the confession into evidence a defendant would have the right to present to the jury *all* the "circumstances" surrounding its procurement. The fiction petitioner asks the Court to adopt is that this evidence is *always* admissible, as a matter of constitutional law, because there is no distinction between evidence relevant to voluntariness and evidence relevant to credibility.

What petitioner wants to do is to relitigate the issue of voluntariness before the jury, even though, under the orthodox rule, the jury does not have the option to reject the confession as involuntary. He wants the jury to reject the confession not because they believe that an impressionable child "made up" a story to please the police, but because they believe (or at least suspect) that the police beat the confession out of him.

He wants to throw upon the police the onus of misconduct when that issue has already been settled in a *Jackson* hearing and where, because of evidentiary rules protecting the defendant from being prejudiced by his past criminal experience, the police are unable to adequately respond. He wants to inject into the jury trial a settled issue which will contribute nothing to the jury's determination of guilt or innocence, since, indeed, the rule in *Crane* specifically provides that no competent evidence relating to the "authenticity, reliability or credibility" of the confession is to be excluded (JA 72). Absent from petitioner's argument is any explanation of how the circumstances of his confession relate to credibility.

The question before the Court is whether the rule established by the Kentucky Supreme Court in *Crane* is constitutional. Petitioner states in his brief, at 42, that there is a need for a definitive statement of law from the Court. In *Lego* v. *Twomey,* 404 U. S. 477, 485-486 (1972), the Court said:

> Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as *free since Jackson as he was before* to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. (Emphasis added).

Lego affirmed that the states *are free* to establish their own procedures so long as these comport with *Jackson* and the U. S. Constitution. The passing reference to "voluntariness" above does not, as petitioner believes, require the issue of voluntariness and its underlying facts be tried again before the jury. Rather, this is a reference to the fact that the Court has found both the Massachusetts rule (retrying voluntariness) and the orthodox rule (leaving the determination to the judge) constitutionally acceptable. *Jackson* v. *Denno,* 378 U. S. at 378-379. There is nothing in either *Jackson* or *Lego* which leads to the conclusion that the rule of the Kentucky Supreme Court in *Crane* is unconstitutional.

a. There Can Be No Prejudicial Restriction of Petitioner's Sixth Amendment Rights in Theory.

Petitioner reasons that any restriction of his opportunity to cross-examine is unconstitutional, citing *Chambers* v. *Mississippi,* 410 U. S. 284 (1973). However, the Court in *Chambers* emphasized that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures" (*Id.,* at 302-303). See Churchwell, "The Constitutional Right to Present Evidence: Progeny of *Chambers* v. *Mississippi,*" 19 *Criminal Law Bulletin* 131, 137 (1983). Petitioner forgets that not only do the states have an interest in establishing their own procedures but that even when focused upon a relevant issue cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude

repetitive and unduly harassing interrogation . . . ." *Davis* v. *Alaska,* 415 U. S. 308, 316 (1974). It is axiomatic, of course, that no criminal defendant has a right to cross-examine regarding a matter which is *irrelevant,* as a matter of law, to the issue before the trier of fact.

The rule of the Kentucky Supreme Court in *Crane* cannot be unconstitutional in theory because it specifically allows for the presentation, by cross-examination or otherwise, of all evidence relating to the "authenticity, reliability, or credibility of the confession." *Crane,* JA 72. In other words, all *relevant* evidence is to be presented to the jury.

Throughout his brief petitioner consistently misrepresents this aspect of the rule in *Crane.* Petitioner acts as though the Kentucky Supreme Court has held that the circumstances of a confession are *never* admissible. See, e.g., petitioner's appendices, where Kentucky is stuck out all alone under the heading "Orthodox Rule — Circumstances Inadmissible," at 7a. What the Kentucky court actually held was that "there was no error in excluding from the jury the circumstances [of the confession] relating solely to voluntariness." *Crane,* JA 71. It was the further opinion of the Kentucky court that the proffered evidence did relate solely to voluntariness. *Id.* Under *Crane,* any defendant who could actually show that the circumstances of his confession were relevant to credibility would be entitled to introduce evidence about the taking of the confession.

There is no question that the issue of voluntariness is one which may constitutionally be left to the trial judge alone.[12] *Jackson* v. *Denno,* 378 U. S. at 378; *Lego* v. *Twomey,* 404 U. S. at 490. In those states following the orthodox rule this issue is not submitted to the jury and the trial court's findings are binding and conclusive. Kentucky Rule of Criminal Procedure 9.78. Evidence relating solely to this issue is, by definition, irrelevant to the determination of a defendant's guilt or innocence and the defendant has no right to the introduction of such evidence. The rule of the Kentucky Supreme Court in *Crane* merely clarifies, for the area of confessions, the oldest law on the books. Evidence, to be admissible, must be relevant.

b. Petitioner is Protected Against Any Prejudicial Restriction of His Sixth Amendment Right in Practice.

Because the rule of the Kentucky Supreme Court in *Crane* only sanctions the exclusion of evidence relating to voluntariness when that evidence has "little or no relationship to any other issue" (JA 72), it is not possible for the rule to be a constitutional violation of the defendant's rights in theory. Respondent further submits that it is unlikely to present a constitutional violation in practice.

The cornerstone of petitioner's argument must be that the rule in *Crane* cannot be *constitutionally* applied. Petitioner reasons that this is so because the

[12]Petitioner in fact argues this issue even though the constitutionality of the orthodox rule was not raised below. Brief for Petitioner, at 41. This issue is not before the Court. *Monks* v. *New Jersey,* 398 U. S. 71 (1970).

determination of voluntariness is a "threshold" issue and because there "is no articulable distinction between evidence relative to voluntariness and evidence relevant to credibility." *Crane, supra* at 755 (Leibson, J., dissenting); JA 73.

At first glance this position is appealing. The Kentucky Supreme Court acknowledged in *Crane* that the separation of factors of voluntariness and credibility may be difficult (JA 71-72).[13] The inherent flaw in this formulation, however, is that it necessarily leads to the erroneous idea that the "judge's decision about coercion does not preempt the jury's *need to consider evidence about coercion in deciding guilt.*" *Crane, supra,* at 755 (Liebson, J., dissenting, emphasis added); JA 74. Any issue of coercion, however, is decided by the trial court as a matter of law; the issue must be fully resolved before the confession is admitted. *Miller* v. *Fenton, supra,* at 11; *Jackson,* 378 U. S. at 387. To argue that the jury needs to consider coercion in deciding guilt is asking the jury to consider, for example, that the defendant's *voluntary* confession is not true because the police tortured the defendant for days to obtain it!

This Court's voluntariness standard, focusing on factors other than reliability, makes it unlikely that a criminal defendant's Sixth Amendment or Due Process rights will be unduly restricted by the *Crane* rule. This

[13]That has not prevented this Court, however, from prohibiting the trial judge from considering indicia of reliability in his or her determination of the voluntariness of the confession at the suppression hearing. *Rogers* v. *Richmond,* 365 U. S. 534, 545 (1961).

is so for two reasons. First, the divided functions of judge and jury no longer overlap. The Court has made it clear that its legal standard of voluntariness is to be applied in as broad a manner as possible and may relate to the specific, individual weaknesses of that particular criminal defendant. *Miller, supra,* at 12. There is no longer any reason for the jury to weigh the circumstances of the confession which relate solely to voluntariness and have little or no relationship to any other issue. Second, the Court in *Jackson* v. *Denno,* 378 U. S. at 380, held that a "defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." This hearing and any exclusion of evidence during the trial in chief would be fully reviewable at the state and federal levels. This protects the defendant from an erroneous restriction of rights based upon a trial court's mistaken application of the *Crane* doctrine as surely as similar review protects a defendant's established constitutional rights in any event.

c. The Rule in *Crane* is Supported by Sound Policy Considerations.

First, the rule enhances the likelihood of a correct determination of voluntariness as a matter of law. If petitioner's approach were constitutionally required, all circumstances surrounding all confessions would be submitted to the jury. The only difference between the orthodox and Massachusetts rule would then be that

with the Massachusetts procedure the jury is charged that they can exclude the confession if they find it was not voluntary. Although petitioner argues that the Court should declare the orthodox rule unconstitutional, an issue not raised below,[14] it is the Massachusetts rule which is the more constitutionally suspect of the two. As one commentator has noted, the "second-guessing" of the trial judges' voluntariness ruling, inherent in the Massachuetts rule,

> gives rise to some problems. Since the trial judge need only satisfy himself that the confession is admissible on the basis of a preponderance of the evidence and he knows that, whenever he decides to admit the confession, the defendant may insist that the issue also be tried to the jury, there may develop a tendency to allow the confession to be received, thus undermining to some extent the protection which *Jackson* sought to insure. Moreover, where the issue of voluntariness is tried to the jury, a conviction thereafter raises the same difficulty of review which *Jackson* sought to obviate — the difficulty of deciding whether a possibly involuntary confession affected the jury's verdict.[15]
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> 1 Louisell and Mueller, *Federal Evidence* § 34, at 251-252 (1977).

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[14]See respondent's Argument I.B., *infra.*

[15]In *Schneble* v. *Florida,* 405 U. S. 427 (1972) the Court split over the harmlessness of a *Bruton* error where the issue of voluntariness was presented to the jury. The majority assumed the jury must have found the confession voluntary because if they had rejected it, there would have been insufficient evidence to convict. The dissent, drawing all reasonable inferences in favor of the defendant, assumed the confession was deemed involuntary by the jury, but that they convicted anyway.

If petitioner has his way, and all the circumstances of the confession bearing on voluntariness are routinely presented to the jury without the instruction, the same results will occur. It does not take much analysis to determine that where a jury is presented, on one hand, with a confession to the crime, and on the other, a one-sided inference that the confession was beaten out of the defendant, they will be discussing the effects of this "coercion" in the jury room with or without the instruction. Because the trial court is fully aware that this "second guessing" is going to occur in any event, the temptation will be to pass the confession along to the jury *pro forma,* undermining the injunction of *Jackson,* 378 U. S. at 391, that a criminal defendant is entitled to "a reliable and clear-cut determination of the voluntariness of the confession. . . ." By emphasizing the crucial role of the trial judge in the determination of voluntariness, the rule in *Crane* avoids this limitation of the Massachusetts rule. As the Court said in *Lego* v. *Twomey*, 404 U. S. at 490, speaking of the Massachusetts rule, "[w]e are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim."

Second, the Kentucky Supreme Court recognized in *Crane* that there may be difficulty in the separation of factors relating to voluntariness and credibility and felt this "separation is best vested in the hands of the trial judge and not in the minds of the jurors" (690 S. W. 2d at 755); (JA 72). This Court has previously

noted a "failure to distinguish between the discrete issues of voluntariness and credibility. . . ." *Jackson,* 378 U. S. at 387, n. 13. The issue is better left to the trial court.

Third, also recognized by the Kentucky Court in *Crane,* is the fact that the issue of voluntariness is a settled issue, no longer debatable except on appeal (690 S. W. 2d at 755); (JA 72). This consideration has been fully explored. Where the evidence is irrelevant to the jury's task, what *constitutional* purpose is served by its presentation to them?

Finally, the Kentucky Supreme Court recognized that during the "retrial" of a voluntariness hearing, were the defendant allowed to present to the jury "all" the circumstances surrounding the procurement of his confession, only *some* of the circumstances would actually be presented. Said the court:

> . . . the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc. are excluded.
>
> *Crane,* 690 S. W. 2d at 755; JA 72

Even when the defendant takes the stand the scope of the State's inquiry may be limited. Petitioner, however, states that this danger is "unlikely to occur in any case" because the prosecution could rebut any inference of inexperience with evidence of prior convictions (Brief for Petitioner, at 33).

Petitioner is certainly correct in implying that the only way a prosecutor could demonstrate a defendant's familiarity and experience with the criminal justice system would be through a showing that a defendant had been arrested and/or interrogated and/or convicted previously. However, the rule in Kentucky is that no evidence of prior arrest, questioning, or conviction may be admitted where the witness does not testify. The narrowly drawn exception to this rule occurs where the prior conviction or other police activity is intrinsically linked to the case then being tried; as, for example, when a defendant has been previously convicted of the terroristic threatening of a murder victim. If a defendant in Kentucky does take the stand he may be asked only if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it.[16] The Kentucky Supreme Court was correct; there is no fair way to litigate the voluntariness of the confession of an experienced criminal before the jury. Yet this fact may play a crucial role in the voluntariness determination.

Finally, has petitioner really demonstrated the need for a rule of constitutional law requiring that all the circumstances (whatever the word "circumstances" may mean) of all confessions must be admitted because they are always, as a matter of constitutional law, relevant to the credibility of the confession? Consider the following hypothetical. A criminal defendant gives a

[16]See *Commonwealth* v. *Richardson*, Ky., 674 S. W. 2d 515 (1984).

detailed point-by-point description of a murder. It is known that there were no accomplices. There are only two possibilities. Either the defendant is:

1) the killer, or
2) an innocent party coached by police on the details of the crime.

Kentucky has no hesitation in stating that even if the police coached an innocent person anxious to confess to any crime, for psychological reasons, no Court would hold the confession voluntary. If the police forced the innocent party to repeat the details of the crime the answer is equally obvious. If the trial court rules the confession voluntary and admits it into evidence, *none* of the circumstances surrounding its procurement are relevant to credibility. To hold that a jury which, by law, must consider the confession as evidence is *constitutionally* required to consider the "circumstances" as bearing on credibility is, it appears to respondent, to challenge the adequacy of the suppression hearing and all appellate review. Only if petitioner shows that the mechanism of the suppression hearing and further review is inadequate can he demonstrate the need for a *per se* rule. What rights of the defendant are harmed in the above scenario? Petitioner has failed to provide a logical reason for the Court to support his claim. The decision of the Kentucky Supreme Court should be affirmed.

B. The Rule in *Crane* is Based Upon the Recognition That Different Evidence May Be Required to Decide a Question of Law Versus a Question of Fact. The Rule Does Not Force an Unconstitutional Choice Between the Exercise of Individual Constitutional Rights.

Petitioner is quite right when he states that the *Crane* rule recognizes a substantial distinction between the role of the jury in confession cases as opposed to some other types of cases. Respondent submits that the distinction is logical and proper.

Unlike other evidence, admissibility of a confession has nothing to do with its probative value. As this Court has stated:

> Our decisions . . . have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.
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> *Rogers* v. *Richmond,* 365 U. S. 534, at 540-541.

This fundamental distinction is at the heart of the *Jackson* v. *Denno* concern that a jury cannot be relied upon to disregard trustworthy evidence and reject a coerced, albeit undeniably true, confession. *Jackson,* 378 U. S. at 382.

Miller v. *Fenton, supra* (decided Dec. 3, 1985), again underscored the uniqueness of confession cases and held that voluntariness is a question of law and that the subsidiary fact questions of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness.

The foregoing demonstrates the error in petitioner's hypothetical about a defendant who wishes to show that he did not possess contraband discovered in a search. *Crane* would not prohibit a defendant from relitigating the fact of possession to the jury. The claim in the hypothetical is similar to the fundamental question in a confession case of whether the confession was made at all. *Crane* permits a defendant to introduce evidence ". . . relating to authenticity, reliability or credibility of the confession" (*Crane, supra,* at 755); (JA 72). When a defendant denies possessing contraband or making a confession attributed to him an issue of authenticity and credibility is raised. *Crane* specifically leaves such issues for the jury.

The same is true of petitioner's argument relating to identification questions. This Court has previously distinguished between confession and identification cases in *Watkins* v. *Sowders,* 449 U. S. 341 (1981). Unlike a confession, "[i]t is the reliability of identification evidence that primarily determines its admissibility. . . . (Citations omitted)." *Id.* at 347. In such cases the trial judge and jury are both making the same determination, i.e., the reliability of the identification. As respondent has explained, the question

of voluntariness has little or nothing to do with credibility. Binding the jury on the subsidiary facts involved in the voluntariness determination does not deny a defendant due process of law. *Miller* v. *Fenton, supra.*

Petitioner next complains that there is no distinction between facts relating to credibility and facts relating to voluntariness. The questions of location and length of detention and the defendant's character and background have been held material to voluntariness. *Fikes* v. *Alabama,* 352 U. S. 191 (1957). Factors such as the size of the room and number of police officers present at the interrogation have no relation to demeanor or credibility. What is there in the foregoing that relates to credibility? How do any of these factors contribute to an inaccurate confession? There was no dispute about those factors. Petitioner did not say that he was somehow misled in his statement by the sheer number of policemen or dimensions of the room.

As for his supposed low mentality, it was uncontroverted that the only deficiency related to academic standing (TH 36-37). Petitioner is a sophisticated delinquent (TH 39-40).[17]

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[17]Petitioner's oft repeated assertion that he was functioning at a third or fourth grade level (Brief for Petitioner 6, 7, 38) was not presented on avowal. It was not discussed as a factor relating to credibility when the trial court ruled (TE II 3-7; JA 27-30). Nor was the mentality of petitioner even mentioned in his state court brief. The issue is not properly before this Court. *Monks* v. *New Jersey,* 398 U. S. 71 (1970).

His only proven psychological aberration was a tendency to tell lies in order to appear important (TH 41-42). That facet of petitioner's character does relate to credibility and was fully explored during cross-examination of the officers through illumination of inconsistencies and errors in the statement.

The Kentucky Supreme Court stated the rationale behind the *Crane* rule as follows:

> The dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession are obvious. We have previously spoken of the difficulty in separation of those factors relating to voluntariness and those relating to credibility, and feel this separation is best vested in the hands of the trial judge and not in the minds of the jurors. Second, the issue of voluntariness is a settled issue, no longer debatable except on appeal. Third, the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with Miranda rights, etc, are excluded.
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> *Crane, supra,* at 755; JA 71-72.

The policies for insulating voluntariness from review by the jury stated above are reasonable. The rule serves the important goal of separation of the responsibilities of the trial court and jury. *Miller, supra,* holds that voluntariness is a question of law, and because it is a question of law the trial court's conclusion is entitled to no special deference even in federal court. *Id.,* at 8. A defendant's rights are fully protected by

the appellate process. Resubmitting the issue to the jury, therefore, is an exercise in futility. This Court has stated:

> *Duncan* v. *Louisiana,* 391 U. S. 145, (1968), which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it. We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim.
>
> *Lego* v. *Twomey,* 404 U. S. at 490.

The fact that some states permit a defendant to argue voluntariness to the jury does not mean that Kentucky's refusal to do so is constitutional error.

Petitioner begins by arguing that the excluded testimony, preserved on avowal, was probative to the credibility of his confession. By the end of his brief petitioner is arguing that it was error not to submit the voluntariness issue to the jury (Brief for Petitioner, at 40). By this petitioner attacks the orthodox rule itself, not just Kentucky's interpretation of it. Such a result is not possible in this case since the issue was raised neither at trial nor on appeal. The Kentucky Supreme Court was never asked to adopt the Massachusetts rule, which requires a voluntariness instruction to the jury. See, *Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985); JA 68-72.

This is not the only example of petitioner's stretching the appealable issue in the case at bar. Also argued is the constitutionality of the Kentucky Supreme Court's holding in *Crane* that the trial judge's determination of voluntariness is conclusive and binding on the jury. Petitioner states that this ruling "insulates the issue of voluntariness from application of the reasonable doubt standard by the jury at trial and therefore violates the Due Process Clause of the Fourteenth Amendment."[18] Brief for Petitioner, at 41. Again, the issue is not before the Court, not having been raised below. It *is* the identical issue raised and decided by the Court in *Lego* v. *Twomey,* 404 U. S. 477, 489 (1972).

Petitioner's final argument is that the *Crane* rule requires him to choose between rights. He claims that Kentucky law would permit a defendant who waives complaints about voluntariness to present all evidence surrounding procurement of the confession. Petitioner misunderstands Kentucky law.

In *Diehl* v. *Commonwealth,* Ky., 673 S. W. 2d 711 (1984), the defendant claimed a consent to search given by his wife was not voluntary. She was permitted to testify at trial but was precluded from testifying about the voluntariness of her consent. *Id.,* at 712. Based upon *Diehl,* whether or not a defendant challenges the voluntariness of his confession at a suppression hearing he will be permitted to present any and all evidence

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[18]Kentucky adopted a preponderance of the evidence standard for the voluntariness determination at the suppression hearing in *Tabor* v. *Commonwealth,* Ky., 613 S. W. 2d 133 (1981). The burden, of course, is on the prosecution.

relating to any issue except voluntariness. There is no dilemma involved.

Petitioner's own conflicting claims merely confuse the issue. The only question presented by this case concerns the propriety of the trial court's restriction of the evidence sought to be introduced by the petitioner when, in the judgment of the trial court, that evidence was irrelevant to the determination of petitioner's guilt or innocence. *Crane* v. *Commonwealth,* 690 S. W. 2d at 755; JA 71. As respondent has demonstrated, this distinction is justifiable where, at little or no cost to the criminal defendant, important State interests are served. The judgment of the Supreme Court of Kentucky should be affirmed.

II. IF KENTUCKY ERRED BY LIMITING THE ADMISSION OF EVIDENCE, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Should the Court decide that Kentucky violated Major Crane's constitutional rights by the restriction of defense counsel's cross-examination of the interrogating officers, summary reversal of Crane's conviction is not required. Instead, this case should be remanded to the Kentucky Supreme Court for a determination of prejudice.

In *Chapman* v. *California,* 386 U. S. 18 (1967), the Court firmly rejected the argument that all federal constitutional errors, regardless of significance to the specific case, must be considered inherently harmful. The Court reasoned that in the context of a particular case the perceived error may have had very little influence (if any) on the jury's verdict at trial, and that where a reviewing court may confidently say that no such effect occurred, the reversal of the conviction provides an unjustified windfall for the defendant. *Id.* at 21-24; *United States* v. *Hasting,* 461 U. S. 499, 508-509 (1983). Since *Chapman*, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction will not be set aside if the constitutional error that occurred before or during trial was harmless.[19] Even a coerced confession may be harmless. *Harrington* v. *California,* 395 U. S. 250 (1969); *Milton* v. *Wainwright,* 407 U. S. 371 (1972).

Petitioner is left, therefore, with the notion that the error in this case was (and is) so egregious that it

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[19]The Court has before it the question of whether an erroneous restriction upon a defendant's opportunity to impeach an adverse witness can ever be harmless. *Delaware* v. *Van Arsdall,* No. 84-1279 (October term 1985). In the recent past the Court has applied the harmless error doctrine in *Rushen* v. *Spain,* 464 U. S. 114 (1983) (right to be present at trial); *United States* v. *Hasting, supra,* (improper comment on defendant's silence at trial, in violation of Self-Incrimination Clause); *Hopper* v. *Evans,* 456 U. S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of Due Process Clause); *Moore* v. *Illinois,* 434 U. S. 220, 232 (1977) (admission of identification in violation of Sixth Amendment Counsel Clause); *Brown* v. *United States,* 411 U. S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright,* 407 U. S. 371 (1972) (admission of confession in violation of Sixth Amendment Counsel Clause); *Chambers* v. *Maroney,* 399 U. S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama,* 399 U. S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of Sixth Amendment Counsel Clause).

strikes at the very heart of the concept of a fair trial and effectively eliminates all confidence in the verdict of that trial. This situation is not presented by the case at bar. Petitioner contends only that the trial court's ruling prevented him from developing for the jury the following circumstances: "to wit, evidence of the number of police officers who interrogated the petitioner; the length of the interrogation and the dimensions of the room in which the interrogation was conducted."[20]

In fact, the jury heard testimony about the length of detention prior to the confession. During his opening statement petitioner told the jury he would introduce evidence concerning the circumstances of the arrest and questioning which would show that the confession was not credible (JA 23-24).

At the trial evidence was introduced showing that Detective Branham was informed of the arrest at 6:15 p.m. He said he took the taped statement beginning at 7:50 p.m. (JA 31).[21] The foregoing evidence was more favorable to Crane than the actual facts warranted because it initially appeared that Crane might have been questioned during the entire hour and forty-five

[20]Brief for Petitioner, at 7. The avowal testimony of the interrogating officers, during which petitioner was able to ask *all* the questions he would have asked before the jury, appears at JA 45-52.

[21]Branham also said the confession began at 8:50 p.m. (JA 32). That time is undoubtedly a mistake. All witnesses repeatedly said the actual time was 7:50 p.m. (JA 6, 11, 46). Crane was handed over to social workers at 8:45 (JA 13). Any belief by the jury that questioning lasted an extra hour merely strengthens the harmless error argument.

minutes. In fact, Crane was arrested at 5:52 p.m. No questions were even asked until 6:08 p.m. (JA 3-4). Next, some twenty-five minutes were consumed by processing at the police station (JA 49). There were some questions on the way to the Youth Bureau. Another twenty-one minutes were required for paper work at the bureau. Burbrink said he did not finish processing Crane until 6:59 (JA 5). Based on the record Crane was questioned for less than an hour prior to the taped confession.

Evidence was also introduced showing that the only people present during the questioning were Crane and four other officers. Again the evidence presented to the jury was more favorable than the actual facts. There was no police plot to isolate Crane.

Uncontroverted evidence proved that police informed Crane's family at once of the arrest. An aunt told police at 5:52 p.m. that she and Crane's mother were on their way (JA 4). Testimony showed that police made numerous attempts to contact the family all evening (JA 7, 50-51).

Petitioner was also permitted to examine witnesses on the inconsistencies in the confession.[22] Discrepancies relating to whether money was taken (JA 33, 41-42; TE IV 54), whether it was possible for Crane to have heard or seen the victim trigger an alarm (JA 33, 41-43), the time of the crime (JA 38, 41) and the caliber of the murder weapon (*Id.*) were all discussed at

[22]The voluntariness and admissibility of this confession, as a matter of law, is not contested. The confession will be used against Major Crane at any retrial.

length. Vigorous defense arguments on these same points were made to the jury (TE VI 19-26).

The evidence aside from Crane's confession, such as his admission to his mother and the co-defendant's confession, thoroughly incriminated Crane. The avowal testimony on the size of the room was the only supposedly relevant evidence which the jury had not already heard.

In view of the amount of evidence that Crane was permitted to introduce and in view of the overwhelming evidence, the limits placed on defense evidence did not deny Crane a fair trial. *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Gordon* v. *United States,* 344 U. S. 414 (1953); *Harrington* v. *California, supra.*

When this issue was first raised in the Kentucky Supreme Court the respondent argued harmless error.[23] However, because the Kentucky Supreme Court found that no error had been committed, it did not reach that issue in its opinion.[24] Nonetheless, should the Court decide that constitutional error has been committed, it should remand this case back to the Kentucky Supreme Court for a determination of prejudice.

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[23]*Crane* v. *Commonwealth,* Kentucky Supreme Court, No. 84-SC-407-MR, Brief for Appellee (June 20, 1984), at 15.

[24]*Crane* v. *Commonwealth,* Ky., 690 S. W. 2d 753 (1985).

CONCLUSION

For all the foregoing reasons the judgment of the Supreme Court of Kentucky should be affirmed, or, in the alternative, the case should be remanded to that Court for a determination of prejudice.

Respectfully submitted,

DAVID L. ARMSTRONG
Attorney General of Kentucky

JOHN S. GILLIG
Assistant Attorney General of Kentucky

VIRGIL W. WEBB III
Assistant Attorney General of Kentucky
116 Capitol Building
Frankfort, Kentucky 40601-3494
Telephone: (502) 654-7600
Counsel for Respondent